IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MICROTRONICS, INC.,	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	Case No. 03-1159- WEB
CITY OF IOLA, KANSAS;	)	
JOHN McRAE, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

The Court now considers the motion to dismiss by defendants City of Iola, Kansas, John McRae, Lee Gumfory, Bob Hawk, Doug Colvin, Kent Tomson, and Steve Robb (collectively "Defendants"). (Doc. 15). Defendants contend that plaintiff Microtronics, Inc. ("Plaintiff") fails to state a federal claim in its Complaint (Doc. 1), and that the Court is thus without subject matter jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

In its Complaint Plaintiff alleges that it is a Kansas corporation which formerly operated in the defendant City of Iola, Kansas ("City"). Plaintiff obtained electrical service from the City for its business operations. The remaining defendants are elected officials or employees of the City.

Plaintiff began experiencing problems with the electrical service in "approximately July 2000 . . . ." Complaint, ¶17. Plaintiff alleges that "the City's defective electrical service . . . ." repeatedly damaged or destroyed Plaintiff's electrical equipment. *Id*., ¶ 18. Plaintiff informed the City of the problems, and after an inspection the City, "on approximately July 15, 2000 . . . install[ed] a new utility pole supporting a

separate 37.5 KVA transformer so the [Plaintiff's] facility would have a proprietary source of transformation." *Id*., ¶ 20.

This did not solve the problems, however, which only grew worse. The Plaintiff tried a number of remedies, including installing additional grounding in August 2000 and January 2001, installing a power disturbance recorder on or about August 18, 2000, installing an uninterruptible power supply on approximately September 1, 2000, and installing a new main breaker panel on January 3, 2001. But the problems continued unabated.

On January 22-24, 2001, "it was noted that the utility service transformer was a single phase, 2400 volt primary/240-120 volt secondary and that the neutral of the primary and secondary were bonded together at the pole as well as grounded at the pole." *Id.*, ¶ 35. On February 8, 2001, Plaintiff's agents met with defendant Kent Tomson (Tomson), the City's Superintendent of the Electrical Distribution Department, "to review the situation." *Id.*, ¶ 36. At some point Plaintiff requested the City to install an "isolated 4,160 volt, phase to phase delta-Y transformer in replacement of the . . .then existing 2,400 volt phase to neutral Y-Y transformer supplying the [Plaintiff's] facility." *Id.* Plaintiff alleges that, although "circulating current problems are well known as an inherent problem in Y-Y transformer architecture, the City refused at that time to install a delta-Y transformer for Plaintiff to alleviate the problems." *Id.*

On September 5, 2001, Tomson visited Plaintiff's facility to "discuss the City's prior activities at the facility." *Id.*, ¶ 38. During the meeting, "it was noted that the neutral and ground conductors within the two interior panels were solidly interconnected." *Id.*, ¶ 39. When it was recognized that this was contrary to the National Electrical Code ("NEC"), Tomson was asked to summon the City Inspector. The City Inspector came to the site, and Plaintiff requested permission to disconnect the neutral and ground

conductors. The City Inspector said the request would be granted if it conformed to the NEC. Plaintiff does not describe how or when permission was granted, but it does allege that "[f]ollowing the events of September 5, 2001, the grounding interconnects were eliminated . . . ." *Id.*, ¶ 42.

The problems continued, however, and Plaintiff again contacted Tomson and asked the City to install recording equipment between the transformer and the meter "to monitor and record secondary line-to-neutral voltages at the transformer for a period of seven days." *Id.*, ¶ 43. The City gave its authorization, and the data showed that the "voltage levels delivered by the City . . . were consistently above nominal values." *Id.*, ¶ 47. The data also showed voltage fluctuations which "were the result of activity on the City's utility network . . . . [and] were not associated with any load . . . generated by [Plaintiff's] facility." *Id.*, ¶ 49.

On December 3, 2001, defendant Doug Colvin, the City Administrator, met with a consultant "to provide background on the problem at [Plaintiff's facility]." *Id.*, ¶ 50. On January 18, 2002, the consultant recommended that "the City's electrical distribution system be monitored in several locations, including [Plaintiff's] facility, the substation feeding the facility and one or two nearby customers, in an effort to track the disturbances." *Id.* Based on the consultant's recommendations, "the City asked the [consulting firm] to further investigate the power quality problems at the [Plaintiff's] facility." *Id.*, ¶ 52. The consulting firm was also provided with the previously recorded data and failed equipment from Plaintiff's facility.

The consultant concluded by March 4, 2002, that the electrical service had "(1) transients or impulses lasting a few microseconds; (2) disturbances lasting a few seconds; and (3) steady state voltage outside nominal operating voltages." *Id.*, ¶ 54. Upon inspecting Plaintiff's equipment, the consultant concluded "that the equipment failures appeared to be caused by voltage impulses . . . ." *Id.*, ¶ 56.

The consultant recommended that the City:

> a. replace the transformer supplying the [Plaintiff's] facility with a three-phase delta-Y transformer rated for a line-to-line voltage of 4160 volts and installing new lightning arresters on the high voltage side of the transformers connected line-to-ground and rated for line-to-ground continuous operating voltage in order to isolate the ground system [Plaintiff's facility] from other systems and eliminate the possibility of inadvertent current flow;
> b. locate and isolate the source of harmonics on the City's system in the area and install voltage transient suppression equipment on the service drops or at the main panels to limit the magnitude and rate-of-rise of the voltage impulses; and
> c. take the line voltage regulator out of service and eliminate the possibility of the regulator overcompensating for changes in load resulting in over excitation of the transformer core supplying the [Plaintiff's] facility.

Id., ¶ 58.

Plaintiff alleges that these recommendations "were similar to and in some instances identical to corrective action requested by [Plaintiff] from the City for more than a year." *Id.*, ¶ 59. The City, however, "refused to implement all of the necessary corrective actions . . . in a timely manner. Instead, the City insisted that a drawn-out process of trial and error be undertaken."[1] *Id.*, ¶ 60. Plaintiff eventually moved its facility to a different community.[2]

Plaintiff also makes general allegations regarding the knowledge and intent of the City:

> At all relevant times hereto, the City refused to take sufficient and effective corrective action, even though [Plaintiff's] damages were significant, ongoing, and known to the City.
> The City was aware not only that its power generation and/or distribution

[1]The Complaint does not state which corrective actions the City refused to take, the time frame in which the City was willing to take action on the remaining items, or the length of the trial and error process proposed by the City.

[2]The Complaint does not state the date of the decision to move.

> systems were causing damage to [Plaintiff's] facility, but was also aware that its systems had caused similar damage to other electrical customers in the City.
> Despite this knowledge, the City failed and refused to adequately investigate and correct the problem and willfully continued to inflict damage upon [Plaintiff], and others.

Id., ¶¶ 61-63.

Based on its allegations, Plaintiff makes a procedural due process claim under 42 U.S.C. § 1983. Plaintiff alleges that it has or had a property interest in the real estate and business operations located in Iola, and that it was "deprived of its property interest without due process." *Id.*, ¶ 77. Specifically, Plaintiff claims it "was denied its property interests through the City's supply of defective electrical power that disrupted its business operations on a continual and repeated basis." *Id.* Plaintiff further alleges that the City's refusal to take corrective action "was willfully and wantonly done by the City in an arbitrary and capricious manner." *Id.*, ¶ 78. Plaintiff also makes state law claims for negligence, strict liability, breach of contract, and breach of warranty.

The Defendants have moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and (6). Defendants admit that, because Plaintiff pleaded under federal law, the Court has subject matter jurisdiction to consider whether Plaintiff states a claim upon which relief can be granted. Defendants contend, however, that Plaintiff has not stated a procedural due process claim, and that because the due process claim is the only federal claim, the remaining state law claims must be dismissed for lack of subject matter jurisdiction.

II. ANALYSIS

A. Procedural standards

"A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief. All well-pleaded factual allegations in the complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997) (citations, internal quotations, and punctuation omitted). "A complaint should not be dismissed under Rule 12(b)(6) 'merely because plaintiff's allegations do not support the legal theory he intends to proceed on . . . .'" *Barrett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir.1994). However, a court should not consider theories that are inconsistent with the complaint. *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir.2001). The Court will consider only well-pleaded facts, not conclusory statements. *JoJola v. Chavez*, 55 F.3d. 488, 494 n. 8 (10th Cir.1995).

A facial attack on subject matter jurisdiction under Rule 12(b)(1) also challenges the sufficiency of the complaint. In reviewing a facial attack, a district court must accept the allegations in the complaint as true. *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir.1995). However, jurisdiction must be based on a complaint's factual allegations, not on mere conclusory allegations. *See Amoco Production Co. v. Aspen Group*, 8 F.Supp.2d 1249, 1251 (D.Colo. 1998) (quoting *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir.1971)).

B. Discussion

1. Identification of the claim

Plaintiff may prevail on its § 1983 claim only if it can show a deprivation of a federally protected right. *See Crown Point I v. Intermountain Rural Elec. Ass'n.*, 319 F.3d 1211, 1216 (10th Cir. 2003). Plaintiff identifies the federally protected right as "procedural due process." As it must under Rule 12(b)(6),

the Court will consider whether the well-pleaded facts make out a claim under this or any other theory. *Cf. Harris v. City of Wichita, et al.*, 1996 WL 7963, *5 (10th Cir.1996) ("The plaintiff's precise legal theories are not clear from their . . . complaint . . . . A constitutional challenge to land-use regulation can be based on, among other things, the Takings Clause of the Fifth Amendment . . ., [and] the Due Process Clauses of the Fifth and Fourteenth Amendments . . . .").

The Court begins with the property interest at stake, which Plaintiff clearly identifies: "Plaintiff has a property interest in the real property and business operations located . . . [in] Iola, Kansas." Complaint, ¶ 76. The parties, nevertheless, sometime argue as if the Plaintiff claims a property interest in good quality electrical service. For example, the Plaintiff relies on *Uhl v. Ness City, Kansas et al.*, 406 F.Supp. 1012, 1018 (D.Kan.1975), *aff'd* 590 F.2d 839 (1979), which held that water utility service could be a constitutionally protected entitlement. The Plaintiff argues that the instant case is similar because providing poor quality electricity is akin to adding "poison to the water." Plaintiff's Corrected Response, at 7.

Uhl is analogous if the Plaintiff is claiming a constitutionally protected entitlement to good quality electrical service, but Court will not read such a property interest into the Complaint when the Plaintiff pleaded otherwise. The Plaintiff pled that it "was denied its property interests *through* the City's supply of defective electrical power that disrupted its business operations on a continual and repeated basis," Complaint, ¶ 77 (emphasis supplied). In other words, the City's electrical service was only the means by which "Plaintiff was deprived of its property interest without due process." *Id.*, ¶ 77.[3]

[3]In addition, *Uhl* was a *substantive* due process case and is of limited help in establishing what process was due to Plaintiff. *See Uhl v. Ness City, Kansas et al.*, 590 F.2d 839 (10th Cir. 1979) ("No Procedural due process violations are claimed.").

Once the property interest is identified, the next issue is how the property interest was allegedly injured by the Defendants. Plaintiff makes broad allegations in this regard, claiming it was "denied" and "deprived of" its property interest. Plaintiff, in fact, cites Fifth Amendment takings cases in support of its "procedural due process" claim. *See* Plaintiff's Corrected Response, at 6 (citing, *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868, 882 (1982) (requiring landlord to allow installation of cable television equipment is a taking); *United States v. Causby*, 328 U.S. 256, 262, 66 S.Ct. 1062, 90 L.Ed. 1206, 1210 (1946) (allowing airplanes to make a low approach is a taking); *Lone Star Industries, Inc. v. Secretary of Kansas Dept. of Trans.*, 671 P.2d 511, 515 (Kan. 1983) (eminent domain and inverse condemnation are takings)).

The Tenth Circuit has held that, where a plaintiff alleges due process and takings violations on the same facts, the matter should be considered under the takings framework. S*ee Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm's of El Paso County,* 972 F.2d 309, 311 (10th Cir. 1992) ("When a plaintiff alleges that he was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's takings claim is based, we have required the plaintiff to utilize the remedies applicable to the takings claim."); *Miller v. Campbell County,* 945 F.2d 348, 352 (10th Cir.1991) ("It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the Just Compensation Clause."). Only if the alleged facts implicate due process rights "beyond the more particularized claim asserted pursuant to the Just Compensation Clause, " should the Court consider the question under the procedural due process framework. *J.B. Ranch, Inc. v. Grand County,* 958 F.2d 306, 309 (10th Cir.1992). *See generally, Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197-200, 105 S.Ct. 3108, 87 L.Ed.2d

126, 145-47 (1985) (comparing Fifth Amendment takings claims with Due Process claims).

2. Takings

"While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions . . . the taking must be for a "public use," and "just compensation" must be paid to the owner." *Brown v. Legal Foundation of Wash.*, 583 U.S. _____, 123 S.Ct. 1406, 155 L.Ed.2d 376, 392 (2003). The first step of the takings analysis is to identify the "interest in property which has been taken." *Kitt v. United States*, 277 F.3d 1330, 1336 (Fed.Cir.2001). Interests which quality as property under the Fifth Amendment are defined in sources independent from the federal constitution, such as state law. *See Lucas v. So. Carolina Costal Council*, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 120 L.Ed.2d 798, 822 (1992).

As set out above, the Plaintiff identifies the real estate and business operations in Iola, Kansas as its interest in property. While these interests would certainly quality as property under Kansas law, the Plaintiff has not alleged that its real estate or business operations were taken for a public use. In *Deisher v. Kansas Dept. of Trans.*, 958 P.2d 656, 664 (Kan. 1998), for example, the Kansas Supreme Court held that while a drop in water tables caused by blasting might support a negligence claim, it was not a taking for public use. "The State neither needed [the plaintiff's] water nor needed to divert their water." *Id.* Here, similarly, there is no allegation that the City needed the Plaintiff's real estate or business operations. The Kansas Supreme Court has recently held that development of a private industrial park was a taking for public use, *General Building Contractors, L.L.C. v. Board of Shawnee County Comm's of Shawnee County*, 66 P.3d 873, 883 (Kan. 2003), but once again Plaintiff does not allege that its real

estate or business operations were taken for such a purpose. In sum, the well-pleaded facts do not show a taking "'rationally related to a conceivable public purpose.'" *Amtrak v. Boston & Maine Corp.*, 503 U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52, 69 (1992).[4]

3. Procedural due process

Given that the takings analysis does not apply, the Court will consider whether Plaintiff has suffered a deprivation of procedural due process. "Procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision. . . ." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th cir.2000). The Court must first determine whether the Plaintiff had a protected property interest. *See Federal Lands Legal Consortium v. U.S.*, 195 F.3d 1190, 1195 (10th Cir. 1999). Only after finding that Plaintiff was deprived of a protected property interest does the Court examine whether the procedures comported with due process. *Id.*

As already noted, the Plaintiff's real estate and business operations were undoubtedly property interests, but the Court can discern no procedural due process rights at issue here. A party is "deprived" of a property interest under the Due Process clause only when government officials act deliberately to cause the deprivation *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir.1996). While Plaintiff alleges in a conclusory fashion that the Defendants deliberately deprived it of its property, the well-pleaded facts do not support its conclusion. Plaintiff describes how the Defendants, from the first month the problems appeared, worked with the Plaintiff to find a remedy. The Defendants' efforts may have been inadequate,

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[4]Even if it were a taking for public use, the Plaintiff's claim is not ripe for failure to bring an inverse condemnation action. *See Rocky Mountain Materials*, 972 F.2d at 311; *J.B. Ranch*, 958 F.2d at 308-09.

they may even have been negligent or otherwise tortious, but there is no *factual* allegation which supports an inference that any of the Defendants decided to deprive Plaintiff of its real estate and business operations by deliberately supplying it with poor quality electrical service. *Cf. Seamons*, 84 F.3d at 1234 (mere negligence is not enough – "there must be an 'element of deliberateness in directing the misconduct towards the plaintiff . . . .").

Even if the Defendants deliberately deprived the Plaintiff of its real estate and business operations by maintaining a defective electrical grid, the Plaintiff does not identify what additional process it should have received from Defendants. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187 (10th Cir.2002) (citation omitted). Far from alleging no opportunity to be heard, the Plaintiff describes several communications and exchanges with the Defendants, followed by the Defendants' responses to each specific request. In the light most favorable to the Plaintiff, the Complaint merely states that the Defendants did not grant all of Plaintiff's requests in a timely fashion or otherwise remedy the problems known to the Defendants.

While this might be actionable under state law, it does not make out a federal constitutional claim. *See Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 88 L.Ed.2d 662, 669 (1986) (The Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States. [Citations omitted.]"). Because the technical details of electrical distribution were within the discretion of the Defendants, the Plaintiff was not deprived of procedural due process simply because all of its requests were not immediately granted and the problems remained unresolved. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30, 39

(1978) (Due Process clause protects legitimate claims of entitlement); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir.1991) (no legitimate claim of entitlement where officials have such discretion that decision making lacks sufficient substantive limitation); *Asher et al. v. Hutchinson Water, Light & Power Co.*, 71 Pac. 813, 814 (Kan.1903) (a city has discretion to run its waterworks for the public benefit). *See also Smith v. City of Owatonna*, 439 N.W.2d 36, 40 (Minn.App. 1989), *aff'd* 450 N.W.2d 309 (citing *Asher* and holding an "individual has no vested right in any manner of [utility] service, and to give such a right would indeed interfere with the government's ability to efficiently provide utility services . . . .").

Because the Plaintiff has not stated a claim, the Court will not consider whether the individual Defendants have qualified immunity. *See Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir.1995). Because the Court has no jurisdiction over the remaining state claims, they must be dismissed as well. *See McMann v. Northern Pueblos Enterprises, Inc*., 594 F.2d 784, 786 (10th Cir. 1979).

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (Doc. 15) is GRANTED, and the Complaint (Doc. 1) is DISMISSED for lack of subject matter jurisdiction.

SO ORDERED this __9th___ day of September, 2003.

s/ Wesley E. Brown

Wesley E. Brown, Senior U.S. District Judge